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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 CONCIERGE COMPOUNDING
8 PHARMACEUTICALS, INC.,

9 Plaintiff(s),

10 v.

11 EXPRESS SCRIPTS, INC.,

12 Defendant(s).

Case No. 2:16-CV-1797 JCM (CWH)

ORDER

13
14 Presently before the court is defendant Express Scripts, Inc.'s ("Express Scripts") motion
15 for partial summary judgment. (ECF No. 32). Plaintiff Concierge Compounding Pharmaceuticals,
16 Inc. ("Concierge") filed a response (ECF No. 40), to which Express Scripts replied (ECF No. 45).

17 Also before the court is Concierge's motion for summary judgment. (ECF No. 35).
18 Express Scripts filed a response. (ECF No. 42). Concierge did not file a reply and the time to do
19 so has passed.

20 **I. Facts**

21 This action arises out of a disagreement between plaintiff Concierge and defendant Express
22 Scripts regarding the terms of their settlement agreement. (ECF No. 1). Generally, the agreement
23 required Concierge to dismiss its case in exchange for Express Scripts releasing its claims for
24 erroneous reimbursements for prescription drugs. (ECF No. 35). The parties disagree as to
25 whether the agreement applies to a certain category of reimbursement claims. (ECF Nos. 1, 32,
26 25).

27 Concierge is a retail pharmacy that fills prescriptions for patients nationwide. (ECF No.
28 1). Among the patients that Concierge serves are beneficiaries of the TRICARE program, a federal

1 health benefit program that serves military personnel and their families. (ECF Nos. 1, 32, 35).
2 The Department of Defense manages the TRICARE program and reimburses pharmacies for
3 prescription drugs provided to TRICARE beneficiaries. (ECF No. 32). However, the Department
4 of Defense does not directly deal with pharmacies and instead uses intermediary contractors to
5 provide reimbursements. *Id.* Express Scripts is one of these intermediary contractors and
6 Concierge is a pharmacy in Express Scripts' network. (ECF Nos. 1, 32, 35).

7 On November 1, 2013, Concierge and Express Scripts entered into a provider agreement
8 where Concierge would submit reimbursement claims to Express Scripts. (ECF No. 32). Express
9 Scripts alleges that subsequent to receiving reimbursements, Concierge would reverse certain
10 claims and never dispense prescriptions. *Id.* On September 1, 2014, Express Scripts terminated
11 the provider agreement on the grounds that Concierge had failed to return over \$100,000 in
12 erroneous payments for prescription drugs. *Id.* Concierge sued Express Scripts over this dispute,
13 which resulted in the settlement agreement at issue. (ECF Nos. 1, 32, 35); *see also Concierge*
14 *Compounding Pharm., Inc. v. Express Scripts, Inc.*, No. 15–37–RGA, 2015 WL 1789748 (D. Del
15 Apr. 16, 2015).

16 Subsequent to the settlement agreement, Express Scripts attempted to collect \$64,727.40
17 for reimbursements made under the TRICARE program. (ECF No. 35). Concierge refused to pay
18 the collection on the grounds that the settlement agreement released any claims relating to those
19 reimbursements. *Id.* On July 28, 2016, Concierge initiated this action claiming that Express
20 Scripts' attempt to collect the reimbursements is a breach of the settlement agreement. (ECF No.
21 1).

22 Now, Express Scripts moves for partial summary judgment, and requests that the court
23 hold that Express Scripts is not in breach of the settlement agreement. (ECF No. 32). Concierge
24 also moves for summary judgment, and requests the court to hold that Express Scripts has breached
25 the settlement agreement and a declaration that the settlement agreement releases Concierge of
26 liability for erroneously paid reimbursements. (ECF No. 35).

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II. Legal Standard

The Federal Rules of Civil Procedure allow summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is “to isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

For purposes of summary judgment, disputed factual issues should be construed in favor of the non-moving party. *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to be entitled to a denial of summary judgment, the nonmoving party must “set forth specific facts showing that there is a genuine issue for trial.” *Id.*

In determining summary judgment, a court applies a burden-shifting analysis. The moving party must first satisfy its initial burden. “When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

By contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the non-moving party’s case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party’s case on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*

1 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the
2 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient
3 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
4 versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626,
5 631 (9th Cir. 1987).

6 In other words, the nonmoving party cannot avoid summary judgment by relying solely on
7 conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040,
8 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the
9 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue
10 for trial. *See Celotex*, 477 U.S. at 324.

11 At summary judgment, a court’s function is not to weigh the evidence and determine the
12 truth, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby,*
13 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to be believed, and all
14 justifiable inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the
15 nonmoving party is merely colorable or is not significantly probative, summary judgment may be
16 granted. *See id.* at 249–50.

17 **III. Discussion**

18 As this is a diversity case under 28 U.S.C. § 1332, the court will apply Nevada state law to
19 determine whether Express Scripts has breached the settlement agreement. *See* (ECF No. 1).

20 To prevail on a claim for breach of contract a plaintiff must demonstrate: (1) the existence
21 of a valid contract; (2) that plaintiff performed or was excused from performance; (3) that the
22 defendant breached the contract; and (4) that the plaintiff sustained damages. *Calloway v. City of*
23 *Reno*, 993 P.2d 1259, 1263 (Nev. 2000). When a contract is clear and unambiguous, contract
24 construction is a question of law and “suitable for determination by summary judgment.” *Ellison*
25 *v. California State Auto. Ass’n*, 797 P.2d 975, 977 (Nev. 1990); *see also Galardi v. Naples Polaris,*
26 *LLC*, 301 P.3d 364, 366 (Nev. 2013). Nevada’s longstanding policy is to interpret and enforce
27 contracts based on the written language, reading words in their usual and ordinary meaning.

1 *Ellison*, 993 P.2d at 1263; *Traffic Control Servs., Inc. v. United Rentals Nw., Inc.*, 87 P.3d 1054,
2 1059 (Nev. 2004).

3 Alternatively, summary judgment is not appropriate when a contract is ambiguous, as the
4 court must rely on extrinsic evidence to resolve ambiguous terms. *Dickenson v. Satte, Dep't of*
5 *Wildlife*, 877 P.3d 1059, 1061 (Nev. 1994). A contract is ambiguous if it may be reasonably
6 interpreted in more than one way. *Galardi*, 301 P.3d at 366. Ambiguity does not arise simply
7 because the parties disagree on how to interpret the contract. *Id.*

8 The settlement agreement is clear and unambiguous. Both parties agreed that Concierge
9 would dismiss its case with prejudice in exchange for Express Scripts releasing claims arising from
10 the case. (ECF No. 35). The agreement goes on to clarify that the contract covers all claims that
11 Express Scripts can waive under law. The pertinent provision reads:

12 Without limiting the generality of the foregoing, it is understood and agreed that
13 this Agreement is intended to cover and does cover all actions, causes of action,
14 claims and demands of whatsoever nature or kind against the Released Parties
15 arising prior to execution of this Agreement that are *waiveable by this Agreement*
under law.

16 (ECF No. 35) (emphasis added). The clear and unmistakable meaning of this provision is that
17 Express Scripts released all claims relating to the dispute except those that are prohibited by law.

18 The court's final inquiry is to determine whether a statute, rule, or regulation prohibited
19 Express Scripts from releasing claims to recover wrongful reimbursements made under the
20 TRICARE program. The TRICARE program is one of many health programs of the uniformed
21 services that the federal government regulates. *See generally* 32 C.F.R. § 199. Section 199.11
22 includes rules that specifically deal with recovering erroneous payments. The applicable rule from
23 this section reads:

24 TRICARE contractors are not authorized to compromise or to suspend or terminate
25 collection action on TRICARE claims. Only the Director, TMA, or designee or
26 Uniformed Services claims officers acting under the provision of their own
27 regulations are authorized.

28 32 C.F.R. § 199.11(g)(2). This regulation does not allow contractors to waive or release claims to
recover overpayments to medical service providers, such as pharmacies. Express Scripts, being a
TRICARE contractor, did not have authorization under 32 C.F.R. §199.11(g)(2) to waive or

1 release claims to collect erroneous reimbursements. Because the settlement agreement excludes
2 claims that Express Scripts did not have authorization to waive, the agreement does not apply to
3 any collection actions for reimbursements made under the TRICARE program. Thus, Express
4 Scripts' attempt to recover erroneous reimbursements does not constitute a breach of contract.

5 Accordingly, because Express Scripts did not breach the settlement agreement, the court
6 will grant Express Scripts' motion for partial summary judgment. For the same reasons, the court
7 will deny Concierge's motion for summary judgment.

8 **IV. CONCLUSION**

9 Accordingly,

10 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Express Scripts' motion
11 for partial summary judgment (ECF No. 32) be, and the same hereby is, GRANTED.

12 IT IS FURTHER ORDERED that the Concierge's motion for summary judgment (ECF
13 No. 35) be, and the same hereby is, DENIED.

14 DATED August 14, 2018.

15 
16 UNITED STATES DISTRICT JUDGE